IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO.624 OF 2000

Shri Palani @ Panni Wilswami Shetty
of Bombay presently undergoing Jail
sentence at Yerawada Prison, Pune. ..Appellant
(Org.Accused
No.1)

Versus

The State of Maharashtra ..Respondent

Mr.H.A.Solkar for the appellant.

Mrs.U.V.Kejriwal Additional Public Prosecutor for
Respondent/State.

W I T H

CRIMINAL APPEAL NO.216 OF 2000

Kishor @ Kishya Raghunath Londhe
Convict No.C-11147,
Yeravada Central Prison,
Pune-411 006 ..Appellant
(Org.Accused
No.2)

Versus

The State of Maharashtra ..Respondent

Ms.Sonia Bankapurkar Advocate appointed for
appellant/org.accused no.2.

Mrs.U.V.Kejriwal, Additional Public Prosecutor for
Respondent/State.

Coram : R.M.Lodha &
R.S.Mohite,JJ

Date : 19.01.2005.

. **Oral Judgment :- (Per : R.M.Lodha,J)**

. Pallani @ Panni Wilswamy Shetty (A1) and Kishor @ Kishya Raghunath Londhe (A2) were put to trial for the offences punishable under section 302 read with section 34 of the Indian Penal Code and sections 395 and 397 read with Section 34 of the Indian Penal Code for having committed robbery on 18.8.1997 in a truck and during the said act committed murder of one Vishnu Gopal Nirmal in the Court of Additional Sessions Judge, Mumbai. Upon conclusion of the trial, the Additional Sessions Judge convicted them for the offences punishable under Section 302 read with section 34 of the Indian Penal Code and each of them were sentenced to under go life imprisonment and also fine in the sum of Rs.500/- and in default of payment of fine, to under go further imprisonment for 3 months. Both of them were also convicted for the offences punishable under Sections 392 and 397 read with section 34 of the Indian Penal Code and sentenced to under go imprisonment for 10 years and fine in the sum of Rs.500/- each and in default of payment of fine, to under go further imprisonment for 3 months. Aggrieved thereby A1 and A2 have preferred separate Criminal appeals before this Court. Criminal Appeal No.624 of 2000 is at the instance of A1 while Criminal appeal no.216 of 2000

is at the instance of A2. As both the appeals are directed against the Judgment and Order dated 31.01.2000 passed by the Additional Sessions Judge, we heard these appeals together and are being disposed of by this common Judgment.

2. In a nut shell, the prosecution case is that on 17.8.1997, a motor lorry bearing registration No.MH-06-7094 owned by Dhanji Devshi dharamshi was loaded with maida (floor) at Khopoli. At about 4.00 P.M. on that day, the said lorry was un-loaded at Britania company. The said lorry was being driven by Vishnu Nirmal (deceased). Vilas somaji Thorat (PW 2) was cleaner in the said lorry. After the weighment of lorry when it was going across Ghodapdev police chowky on its way to Khopoli, A1 & A2 entered into the lorry. A2 entered from the driver's side while A1 entered from the cleaner's side. A1 & A2 were armed with knives. A1 & A2 demanded money from the driver and cleaner. The cleaner (PW 2) was having Rs.30/- in his pocket, that he gave to A1. An amount of Rs.1000/- which was lying in the small drawer near the driver's seat was handed over by PW 2 to A1 & A2. A2 assaulted the driver Vishnu Nirmal by his knife below the nipple of his chest. A1 assaulted PW 2 by knife on his left hand wrist. A1 & A2 ran away. Girish Vasant Sarang (PW 1) PSI attached to Traffic division and who was on duty at Ghodapdev police

chowky was informed by some unknown person that a motor lorry was halted in front of Sardar Carbonic company and driver of that vehicle has been murdered. PW 1 immediately rushed to the spot and found that driver was lying unconscious in his cabin with his stab wounds. The crime was reported to Control room and First Information Report was lodged at the Byculla police station. In the meanwhile, PW 2 had informed the owner of the incident. Upon crime having been registered at Byculla police station, investigation was started. The dead body of the driver was sent for post mortem. During the course of investigation on the disclosure statements of A1 & A2, 2 knives and the clothes were recovered and sent for chemical analysis. Upon conclusion of the investigation, the accused persons were committed to trial.

3. PW 2 is the cleaner and he was in the truck alongwith the driver at the time the incident occurred. His deposition is that when the truck reached Ghodapdev police chowky on its way to Khopoli, A1 & A2 entered into the truck ; that both of them were armed with knives ; that they demanded money from them ; that a sum of Rs.30/- which was in his pocket and the sum of Rs.1000/- which was lying in the small drawer in the truck were handed over to the accused persons ; that A1 inflicted injury by the knife on his left hand wrist and that

A2 inflicted knife blow on the chest of the driver. He is eye witness to the incident cannot be doubted. His evidence is fully corroborated by the medical evidence, forensic evidence, the recovery of the knives and the clothes. Dr.Vijay Tasgaonkar (PW 6) who conducted the post mortem on the dead body of the driver deposed that on external examination, he found incised stab wound over the chest left side 1 cms x below left nipple 6 cm away from the middle line, horizontal in 5th intercostal space both angels, acute size 2 & 1/2 cm x half cm. x querry deep. He further deposed that on dissection skin and subcutaneous tissue in 5th intercostal space out horizontal size 2 & 1/2 cm. x 1/2 cm. pericardium cut horizontal at apical region, edial aspect size by 1 cm x 1/2 cm. were found. Ventricle was found punctured at apex anteriorly size by 1 cm x half cm. PW 6 opined that the cause of death was haemorrhage and shock due to stab injury. Ocular version of PW 2 that A2 inflicted injury below the nipple of the chest of the driver by knife is, thus, fully corroborated by the medical evidence.

4. Deepak Rajaram Dhangar (PW 5) was one of the witnesses to panchanama (Exh.P-15). He deposed that A1 had volunteered to produce a shirt and pant which he was wearing on the date of the incident and also the knife with which he was armed. At the instance of A2, from inside the hut, near Karjat station, A1

took out one plastic bag containing clothes and the knife having blade of about 6 inches. The clothes viz. the full shirt and the pant were identified as articles- 6 & 7 and the knife was identified as article-8. The knife was seized under the panchanama (Exh.P-15-A). Though some infirmities were pointed out in his deposition, on a closer scrutiny of his evidence and the fact that he is not very literate person, in our considered view, those minor infirmities do not affect the credibility of this witness. The recovery of shirt and pant as well as the knife, articles-6, 7 & 8 respectively at the instance of A2 is also established by the prosecution.

5. The memo of recovery of clothes that A1 was wearing on the date of the incident and the knife used in the offence is proved by the evidence of Raja Rammanna Channavati (PW 11) and the recovery by the Investigating officer Uttam Chapne (PW 14). The clothes that A1 was wearing on the date of the incident were identified as articles-9 & 10 and the knife with which A1 was armed was identified as article-11.

6. The clothes of the deceased, the clothes recovered at the instance of A1 and A2 respectively as well as 2 knives recovered at their instance were sent for Chemical analysis. The Chemical analyser’s

report at Exh.36 affirms the blood stains on the clothes recovered at the instance of A2. The blood stains were found to be of human blood with ‘A’ and ‘O’ group. The blood group of deceased is established to be ‘O’ group while the blood group of both the accused persons has been established as ‘B’ group and that of PW 2 is established to be of ‘A’ group. On the knife recovered at the instance of A2 human blood of ‘O’ group was found in Chemical analysis. Forensic evidence, thus, fully supports the prosecution case and connects A2 of having committed murder of Vishnu Nirmal by inflicting the knife blow on the chest of the deceased.

7. The question now arises is of the constructive liability of A1 with the aid of section 34 of the Indian Penal Code. Section 34 of the Indian Penal Code enacts that "when a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone." In **Gurdatta Mal V. State of U.P.** reported in AIR 1965 SC 257 and referred to in the recent Judgment of the Supreme Court in the case of **Saravanan V. State of Pondicherry** reported in 2004 AIR SCW 6260, for the applicability of section 34 of the Indian Penal Code, it was held that the two conditions must be fulfilled (one) that there must be common intention to commit a criminal act and

(two) that there must be participation of the person in doing of such act in furtherance of that intention. If these two ingredients are established, all the accused would be liable to the offence which have been committed.

8. We have, therefore, to see whether the death of Vishnu Nirmal was caused by A1 & A2 in furtherance of common intention to kill him. As is evident from the deposition of PW 2 and we find him worthy of faith that A1 & A2 entered into the truck armed with knives. A1 entered into the truck from the cleaner's side while A2 entered into from the driver's side. Both of them demanded money. Whatever money was available was handed over to them and then A1 inflicted the injury by knife on the left hand wrist of PW 2 and A2 inflicted injury on the chest of the driver by his knife. The facts are eloquent enough and establish beyond doubt that both the accused persons A1 and A2 acted in furtherance of the common intention to kill the driver. Both the ingredients of section 34 are fully established. Needless to say that pre-arranged plan to kill a person may develop on the spot during the commission of the crime. In this view of the matter, conviction of A1 for the offence punishable under Section 302 of the Indian Penal Code for the murder

of the driver Vishnu Nirmal with the aid of Section 34 of the Indian Penal Code cannot be faulted with.

9. We are, thus, satisfied that the learned trial court did not commit any error in convicting the appellants for the offences punishable under Section 302 read with section 34 of the Indian Penal Code and also under sections 392 and 397 read with section 34 of the Indian Penal Code.

10. Both the appeals fail and are dismissed.

(R.M.LODHA,J)

(R.S.MOHITE,J)